Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

ANDRES CAMPILLO

Petitioner

vs.

THE UNITED STATES of AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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20PP

QUESTION PRESENTED FOR REVIEW

I

WHETHER PLEA BARGAINING PRACTICES WHICH EXPRESSLY VIOLATE THE TIME LIMITATION IMPOSED BY FED. R. CRIM. P. 35(b) AND MISLEAD JURIES ABOUT THE SUBSTANTIAL POST TRIAL SENTENCE REDUCTIONS TO BE GIVEN COOPERATING WITNESSES ARE ILLEGAL.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings who were not listed in the caption of the case:

Pedro Hidalgo
Samuel Olivera

TABLE OF CONTENTS

QUESTION FOR REVIEW..... i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii-iv

TABLE OF AUTHORITIES.....v

STATEMENT REGARDING JURISDICTION..... 1-2

STATEMENT OF THE CASE.....3-7

A. Course of Proceedings Below

B. The Trial Testimony

C The Cooperating Witnesses

D. Closing Arguments

E. Postscript

REASON FOR GRANTING THE WRIT.....8-10

I

This case affords the Court the opportunity to for the first time address an increasing problem in Federal criminal trials - prosecutors inducing testimony through illegal practices, misleading juries about the substantial sentence reductions to be given their cooperating witnesses, and, after it is too late for the jury to accurately assess their credibility, obtaining enormous sentence reductions for said witnesses regardless of their

veracity and the limitation period of Rule 35(b) of the Federal Rules of Criminal Procedure.

CONCLUSION..... 11

TABLE OF CITATIONS

CASES

	PAGE(s)
United States vs. Knowles, 66 F.3d 1146 (11th Cir.1995)	8
United States vs. Lowery, 166 F.3d 1119 (11th Cir.1999)	8
United States vs. Orozco, 160 F.3d 1309 (11th Cir.1998)	9
United States vs. Singleton, 165 F.3d 1297 (10th Cir.1999)(en banc)	9

Other Authorities

Rule 35(b), Federal Rules of Criminal Procedure 1,6,8,9,10,11

OPINIONS BELOW

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eleventh Circuit in United States vs. Hidalgo, reported at 197 F.3d 108 (11th Cir.1999) (See Appendix "A"). That opinion affirmed the Petitioner's conviction and sentence. Petitioner's timely Petition for Rehearing was denied on February 16, 2000.(Appendix "B").

STATEMENT OF JURISDICTION

This petition is filed within ninety days of February 16, 2000, the date the Eleventh Circuit denied the Petitioner's Petition for Rehearing. The Court's jurisdiction is invoked under 28 U.S.C. subsection 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 35(b) of the Federal Rules of Criminal Procedure, which is set forth below:

> **Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. section 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after the sentence is imposed. In evaluating whether substantial assistance has been rendered, the**

court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.

STATEMENT OF THE CASE

A. Course of Proceedings Below

On April 28, 1995, a nine count third superseding indictment was filed charging the Petitioner with various drug and weapons offenses. (R1;240). [1] On September 11, 1995, the Petitioner was convicted of three counts of the indictment.(R.2; 392). On February 13, 1996, the Petitioner was sentenced to a total of 352 months imprisonment.(R.3; 469).

B. The Trial Testimony

Although the trial of this case was lengthy, the testimony as to the Petitioner was relatively simple. The entirety of the Government's case against the Petitioner consisted of what is now known to be the mis identification of him by two federal agents, and the uncorroborated testimony of cooperating witnesses testifying pursuant to plea agreements designed to lessen their own time in prison.

On August 28, 1992, Alcohol, Tobacco and Firearms (ATF) Agent Ralph Rodriguez was advised by an informant that he had been solicited by Gilberto Morales to use his boat to import a shipment of cocaine from the Bahamas. (R.20;153,158).

On August 30, 1992, agents observed the informant's vessel depart for the Bahamas with another informant as well as a representative of Morales on board. The Petitioner's co-defendants were observed in the vicinity. The vessel encountered difficulties and returned to the marina.(R.20;168-171).

The following day the vessel again left for the Bahamas. On

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[1] The Symbol "R" refers to the Record on Appeal before the Eleventh Circuit Court of Appeals.

September 2, 1992, the vessel returned to Miami with a large shipment of cocaine on board.(R.20;189).

After turning the cocaine over to the agents, the informant met later that day with Morales and an individual named "Cejas". At the instruction of the agents the informant demanded to be paid for half of the shipment of cocaine prior to delivering it to Morales.(R.23;28). Morales refused to pay for the cocaine but agreed to provide the informant with a van to use in the delivery of the cocaine.(R.21;32). Agents surveilled the meeting at which the van was provided. In addition to Morales and "Cejas", the agents observed and photographed two other individuals who appeared to be countersurveilling the meeting. Both agents misidentified the Petitioner as being the individual in their photograph standing away from a pay phone.(R.25;130).

As the informant stalled the delivery date, Morales and the Colombian suppliers of the cocaine became concerned that "Cejas" was involved in the theft of the cocaine. "Cejas" was kidnaped and held for questioning by the Colombians and an individual named Anthony Lopez. After "Cejas" convinced the Colombians that he was not involved with the informant in the theft of the cocaine, he was released to again help locate the informant. (R.23;61).

Morales convened a meeting to try to find the informant. Agents surveilled the meeting and arrested the individuals as they drove off. (R.21;80-81; R.25;61-62).

The Petitioner was not arrested until 1994.

C. The Cooperating Witnesses

As previously mentioned, aside from the misidentification of the Petitioner by the two Government agents, the only evidence against him consisted of the uncorroborated testimony of Gilberto Morales and Jose Luis Goyriena.

Morales' testimony placed the Petitioner "in the vicinity" when the van was delivered to the informant. He also testified that

the Petitioner assisted in the abduction of "Cejas".(R.23; 37,41,47). Morales pleaded guilty in February of 1993, culminating a ten year career as a seller of cocaine which had netted him several million dollars and a home valued at approximately $850,000.00. Although his plea agreement required his truthful cooperation with the Government, he concealed both his ownership and subsequent sale of his house from the probation department so that his wife could continue receiving welfare benefits. (R.24;5-12).

Morales admitted preparing various outlines of his testimony which he and his wife were distributing to other inmates at both the Metropolitan Correctional Center in South Dade County and the Federal Detention Center in Downtown, Miami. Some of these outlines were prepared after he began his cooperation with the Government and in anticipation of his debriefings by the agents. He denied that the outlines were prepared as part of a plan to enlist other inmates to testify at trial in return for reduced sentences (a practice he called "getting on the bus"). In none of these outlines did he ever mention the Petitioner.

By the time of the Petitioner's trial Jose Luis Goyriena had been arrested on two separate drug indictments, one for conducting a continuing criminal enterprise.(R.27;92). After pleading guilty, he was sentenced to 262 months imprisonment. Like Morales, Goyriena had a long history of drug dealing dating back to 1982. Like Morales, he had profited handsomely for his efforts, estimating that he had netted four to five million dollars.(R.27;96).

Goyriena testified that in September of 1992 the Petitioner contacted him and told him that a large shipment of cocaine was coming in and for him (Goyriena) to get ready to sell it. Goyriena testified that the Petitioner told him there were problems with the load. Specifically, it had been stolen and an individual kidnapped as a result of the theft.(R.27;97-98). Pursuant to Federal Rule of Evidence 404(b), Goyriena also testified as to his receipt of cocaine from the Petitioner on occasions prior to September of 1992.(R.27;99).

D. Closing Arguments

In his closing argument, the prosecutor personally vouched for the Government's main witnesses, Morales, Goyriena and Lopez. The prosecutor began by emphasizing the "truthfulness" requirement of their plea agreements and that the jury should be "glad that they are required to be truthful". (R.30;28-29). The prosecutor assured the jury that these witnesses would "get no benefit from their bargains if they lied". (R.30;28-29).

The prosecutor then assured the jury that the witnesses would not be treated lightly, even with their cooperation: Those witnesses are doing hard time in Federal prison for their crimes. They pled guilty and admitted what they did and they are in jail serving a sentence. This Judge will have a chance to make an adjustment to the sentence. **But, no one in their right mind can sit here and suggest that any of these people are getting out of jail anytime in the near future.**

Morales is doing over 20 years in jail. Goyriena is doing almost 30 years in jail. Lopez faces 10 to life. Those people are being punished for what they did. (R.31;5-6)(emphasis added).

E. Postscript

Within two weeks of the sentencings in this case, the prosecutor successfully obtained a sentence reduction for Lopez, which required him to serve only one month in prison.(R.6;474). A year later, upon the prosecutor's motion, Morales' sentence was cut from 240 months to 10 years imprisonment.(R.7; 566). Since Morales had already been incarcerated for 53 months, the reduction in his sentence meant that he would only serve an additional five and one half years in prison. On November 3, 1998, the Government filed a Motion to reduce Goyriena's 262 month sentence. According to that motion, Goyriena had originally been sentenced on June 26, 1998. Thus, the Government's motion was not filed until more than two years after his sentence had been imposed, in express violation of Rule 35 (b). Moreover, in the motion itself, the Government indicated that while Goyriena was allegedly cooperating with the

Government in this and other cases, he engaged in a scheme to sell "historical smuggling information to other inmates" incarcerated at the Federal Detention Center in Miami "to earn substantial assistance sentence reductions". When the Government polygraphed Goyriena about his participation in this scheme, he "showed deception". The Government nonetheless still sought an illegal sentence reduction for Goyriena. The District Court complied and reduced Goyriena's sentence to 120 months imprisonment.

REASON FOR GRANTING THE WRIT

This case affords the Court the opportunity to for the first time address an increasing problem in Federal criminal trials - prosecutors inducing testimony through illegal practices, misleading juries about the substantial sentence reductions to be given their cooperating witnesses, and, after it is too late for the jury to accurately assess their credibility, obtaining enormous sentence reductions for said witnesses regardless of their veracity and the limitation period of Rule 35(b) of the Federal Rules of Criminal Procedure.

Historically, prosecutors have been afforded a wide latitude in inducing testimony from cooperating witnesses by promising to obtain sentence reductions for them based upon their "truthful" testimony against others. See e.g. United States vs. Lowery, 166 F.3d 1119 (11th Cir.1999). Prosecutors thereafter routinely bolster the credibility of said witnesses by eliciting the "truthfulness" requirement of their plea agreements. See e.g. United States vs. Knowles, 66 F.3d 1146 (11th Cir.1995). As an increasing number of Federal prosecutions, however, rest upon the uncorroborated testimony of these "felon" witnesses, so too does the potential for prosecutorial abuse.

The Petitioner's conviction in this case rested primarily on the testimony of convicted felons who hoped to receive post trial sentence reductions. In what has become the normal practice in Federal criminal trials, the prosecutor withheld the sentence reductions for these witnesses until after they testified at the Petitioner's trial. The prosecutor falsely advised the Petitioner's jury, however, that these witnesses would only receive reductions if

they were "truthful" and that, in any event, "no one in their right minds can sit here and suggest that any of these people are getting out of jail anytime in the near future". (R.31;5-6).

After trial, i.e., after it was too late to show the jury the truth, the prosecutor then obtained enormous sentence reductions for his three key witnesses. He did so regardless of both their veracity and the limitation period in Rule 35(b) of the Federal Rules of Criminal Procedure. The sentence reduction given to Anthony Lopez meant that he served only **one additional month in prison**. The reduction obtained by Gilberto Morales required him to serve only an additional five and one half years in prison. The third witness, Jose Goyriena, received an illegal, out of time reduction of his sentence from 262 to 120 months. The reduction in Goyriena's sentence was granted despite the fact that he had, by the Government's own admission, engaged in a post-cooperation scheme to obstruct justice which he thereafter lied about to government agents.

The prosecutor's conduct in this case infected the entire truth seeking process. Rule 35(b) of the Federal Rules of Criminal Procedure permits prosecutors to seek and the Court to grant a reduction of a cooperating witness' sentence when that witness has provided "substantial assistance" to the government. However, where that assistance involves information known to the witness at the time of their original sentence, the Government has only one year within which to file the sentence reduction motion. Thus, Rule 35(b), by its very terms, provides that a Court may only consider a Rule 35 motion "made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of the sentence". An out of time motion to reduce a cooperating witness' sentence is procedurally barred under Rule 35(b). United States vs. Orozco, 160 F.3d 1309 (11th Cir.1998).

The prosecutor's plea bargaining practices in this case violated the express limitation period of Rule 35(b), and was illegal under United States vs. Singleton, 165 F.3d 1297 (10th Cir.1999)(en banc). The Petitioner's attorney was right on target when in moving to strike the testimony of the Government's cooperating witness he

argued: "His testimony is being essentially paid for by a price that the Government can't pay him . . . I hate to find out that a week or two after this trial the Government files a motion seeking a sentence reduction on something that necessarily violates the Rule, Rule 35(b)". (R.25;184).

It was improper for Goyriena to receive an illegal, out of time sentence reduction. Furthermore, he received it despite engaging in a conspiracy to obstruct justice and then lying about it to the Government. It was also improper for the prosecutor to tell the jury that "no one in their right mind can sit here and suggest that any of these people are getting out of jail anytime in the near future" when, in fact, he intended to and did assist in reducing Lopez' sentence to a **single month**.

Surely, the jury in the Petitioner's case was misled as to essential facts bearing on the credibility of the Government's key witnesses. The latitude given prosecutors to obtain sentence reductions for witnesses based upon their "truthful" testimony against others should not be allowed to evolve into a license to mislead jurors and grant illegal, out of time sentence reductions to witnesses regardless of their veracity and the limitation period of Rule 35(b).

The conduct of the prosecutor in the Petitioner's case is not isolated. It is an increasing problem occurring in Federal criminal trials everyday throughout the country as more and more cases rest upon the uncorroborated word of cooperating witnesses seeking to alleviate the harshness of their own sentences pursuant to the Federal Sentencing Guidelines.

The failure of the Eleventh Circuit Court of Appeals to address the prosecutorial misconduct in this case was tantamount to sanctioning that conduct. Certiorari should be granted so that the Court can put an end to an odious practice which is slowly undermining the integrity of a large number of Federal criminal trials.

CONCLUSION

The Court cannot allow prosecutors to continue to induce testimony through illegal practices, mislead juries and thereafter obtain enormous sentence reductions for their cooperating witnesses regardless of their veracity and the limitation period of Rule 35(b). For the foregoing reasons, the Petitioner respectfully requests that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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By:_____
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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 96-4298 and 97-5316

D.C. Docket No. 92-571-CR-WDF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

PEDRO HIDALGO, a.k.a Pedro Hidalgo, a.k.a. Peter Hidalgo a.k.a Pedro Alvarez, a.k.a. Pedro Alvarez Hidalgo, a.k.a. "Petey", a.k.a. "El Flaco", SAMUEL OLIVERA, a.k.a. El Bobo, ANDRES CAMPILLO, a.k.a. Andy,

Defendants-Appellants.

97-5310

D.C. Docket No. 92-571 CR WDF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

ANDRES CAMPILLO, a.k.a. Andy,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(December 8, 1999)

Before EDMONDSON and BARKETT, Circuit Judges, and COHILL*, Senior District Judge.

BARKETT, Circuit Judge:

Appellants Peter Hidalgo, Samuel Olivera, and Andres Campillo appeal their convictions and sentences on multiple federal drug and firearm charges. For a variety of reasons, each appellant seeks to have his conviction overturned and his sentence vacated. Based upon the record in this case and having considered the argument of the parties, we find no reversible error.

We find one sentencing issue meriting discussion. Appellants contend that the district court erred in enhancing their sentence by two levels for "restraint of a victim" under subsection 3A1.3 of the Federal Sentencing Guidelines. The victim in this case was a co-conspirator who was suspected of betraying the other defendants, and who rejoined the conspiracy after he was released. The appellants argue that, as a matter of law, a co-conspirator may not be considered a victim under this provision of the guidelines. We disagree, finding that the guideline provision allowing enhancement for restraint of a victim contemplates the restraint of any victim, co-conspirator or otherwise. Accordingly, we affirm the appellants' convictions and sentences.

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* Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

97-5310-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ANDRES CAMPILLO,

Defendant-Appellant,

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: EDMONDSON and BARKETT, Circuit Court Judges, and COHILL*,

PER CURIUM:

The petition(s) for rehearing filed by Appellant, Andres Campillo is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

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* Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.